

§ 351.7

parties shall be given a reasonable opportunity to conduct discovery on amended statements.

[71 FR 53328, Sept. 11, 2006]

§ 351.7 Settlement conference.

A post-discovery settlement conference will be held among the participants, within 21 days after the close of discovery, outside of the presence of the Copyright Royalty Judges. Immediately after this conference the participants shall file with the Copyright Royalty Judges a written Joint Settlement Conference Report indicating the extent to which the participants have reached a settlement.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53329, Sept. 11, 2006]

§ 351.8 Pre-hearing conference.

In the absence of a complete settlement in a proceeding not subject to the abbreviated procedures set forth in §§351.3(b) and (c), a hearing will be scheduled expeditiously so as to allow the Copyright Royalty Judges to conduct hearings and issue its final determination in the proceeding within the time allowed by the Copyright Act. Prior to the hearing, the Copyright Royalty Judges may conduct a pre-hearing conference to assist in setting the order of presentation of evidence and the appearance of witnesses at the hearing and to provide for the submission of pre-hearing written legal arguments.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53329, Sept. 11, 2006]

§ 351.9 Conduct of hearings.

(a) *By panels.* Subject to paragraph (b) of this section, hearings will be conducted by Copyright Royalty Judges sitting *en banc*.

(b) *Role of Chief Judge.* The Chief Copyright Royalty Judge, or an individual Copyright Royalty Judge designated by the Chief Judge, may preside over such collateral and administrative proceedings, and over such proceedings under section 803(b)(1) through (5) of the Copyright Act, as the Chief Judge considers appropriate. The Chief Judge, or an individual Copyright Royalty Judge designated by the Chief

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Judge, shall have the responsibility for:

(1) Administering oaths and affirmations to all witnesses;

(2) Announcing the Copyright Royalty Judges' ruling on objections and motions and all rulings with respect to introducing or excluding documentary or other evidence. In all cases, with the exception of a hearing pursuant to 17 U.S.C. 803(a)(2), it takes a majority vote to grant a motion or sustain an objection. A tie vote will result in the denial of a motion or the overruling of the objection;

(c) *Opening statements.* In each distribution or rate proceeding, each party may present its opening statement summarizing its written direct statement.

(d) *Notice of witnesses and prior exchange of exhibits.* Each party must provide all other parties notice of the witnesses who are to be called to testify at least one week in advance of such testimony, unless modified by applicable trial order. Parties must exchange exhibits at least one day in advance of being offered into evidence at a hearing, unless modified by applicable trial order.

(e) *Subpoenas.* The parties may move the Copyright Royalty Judges to issue a subpoena. The object of the subpoena shall be served with the motion and may appear in response to the motion.

(f) *Witnesses sequestered.* Subject to applicable trial order, witnesses, other than party representatives, may not be permitted to listen to any testimony and may not be allowed to review a transcript of any prior testimony.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53329, Sept. 11, 2006]

§ 351.10 Evidence.

(a) *Admissibility.* All evidence that is relevant and not unduly repetitious or privileged, shall be admissible. Hearsay may be admitted to the extent deemed appropriate by the Copyright Royalty Judges. Written testimony and exhibits must be authenticated or identified in order to be admissible as evidence. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the

matter in question is what its proponent claims. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to materials that can be self-authenticated under Rule 902 of the Federal Rules of Evidence such as certain public records. No evidence, including exhibits, may be submitted without a sponsoring witness, except for good cause shown.

(b) *Examination of witnesses.* All witnesses shall be required to take an oath or affirmation before testifying. Parties are entitled to conduct direct examination (consisting of the testimony of the witness in the written statements and an oral summary of that testimony); cross-examination (limited to matters raised on direct examination); and redirect examination (limited to matters raised on cross-examination). The Copyright Royalty Judges may limit the number of witnesses or limit questioning to avoid cumulative testimony.

(c) *Exhibits*—(1) *Submission.* Writings, recordings and photographs shall be presented as exhibits and marked by the presenting party. “Writings” and “recordings” consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. “Photographs” include still photographs, video tapes, and motion pictures.

(2) *Separation of irrelevant portions.* Relevant and material matter embraced in an exhibit containing other matter not material or relevant or not intended as evidence must be plainly designated as the matter offered in evidence, and the immaterial or irrelevant parts shall be marked clearly so as to show they are not intended as evidence.

(3) *Summary exhibits.* The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in the hearing may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The Copyright Royalty

Judges may order that they be produced in the hearing.

(d) *Copies.* Anyone presenting exhibits as evidence must present copies to all other participants in the proceedings, or their attorneys, and afford them an opportunity to examine the exhibits in their entirety and offer into evidence any other portion that may be considered material and relevant.

(e) *Introduction of studies and analyses.* If studies or analyses are offered in evidence, they shall state clearly the study plan, the principles and methods underlying the study, all relevant assumptions, all variables considered in the analysis, the techniques of data collection, the techniques of estimation and testing, and the results of the study’s actual estimates and tests presented in a format commonly accepted within the relevant field of expertise implicated by the study. The facts and judgments upon which conclusions are based shall be stated clearly, together with any alternative courses of action considered. Summarized descriptions of input data, tabulations of input data and the input data themselves shall be retained.

(f) *Objections.* Parties are entitled to raise objections to evidence on any proper ground during the course of the hearing and to raise an objection that an opposing party has not furnished unprivileged underlying documents.

(g) *New exhibits for use in cross-examination.* Exhibits that have not been identified and exchanged in advance may be shown to a witness on cross-examination. However, copies of such exhibits must be distributed to the Copyright Royalty Judges and to the other participants before being shown to the witness at the time of cross-examination, unless the Copyright Royalty Judges direct otherwise. Such exhibits can be used solely to impeach the witness’s direct testimony.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53329, Sept. 11, 2006; 71 FR 59010, Oct. 6, 2006]

§ 351.11 Rebuttal proceedings.

Written rebuttal statements shall be filed at a time designated by the Copyright Royalty Judges upon conclusion of the hearing of the direct case, in the same form and manner as the written